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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

LEE FISHER
Ohio Attorney General
RICHARD A. CORDRAY
State Solicitor
Counsel of Record
CHRISTOPHER S. COOK
ANDREW S. BERGMAN
SIMON B. KARAS
ANDREW I. SUTTER
Assistant Attorneys General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-5026

Attorneys for Petitioners

15 pp

QUESTION PRESENTED FOR REVIEW

Did the court below err in holding that the State must allow a private group to erect a large, unattended Latin cross directly in front of the Ohio Statehouse, on the ground that a private organization's display of a religious symbol in a public forum, even a public forum closely associated with the seat of government, can never violate the Establishment Clause?

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is reprinted in the Appendix ("App.") to this petition at A1-A12. The Sixth Circuit's opinion affirmed the December 21, 1994 Order and opinion of the United States District Court for the Southern District of Ohio. The District Court's opinion is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is reprinted at App. A13-A26. The Report and Recommendation of the Administrative Hearing Examiner, adopted in full by the Capitol Square Review and Advisory Board, is reprinted at App. A27-A37.

The unreported opinion of the Sixth Circuit denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reprinted at App. A40-A42. The in-chambers opinion of Justice Stevens, sitting as Circuit Justice, denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reported at 114 S. Ct. 626 (Stevens, Circuit Justice 1993) and is reprinted at App. A38-A39.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Court of Appeals for the Sixth Circuit was entered on July 25, 1994. *See* App. A1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This case presents the sole issue of whether a private organization's display of an unattended religious symbol in a public forum can ever violate the Establishment Clause. That issue is manifestly worthy of review. Ten years ago, the Court determined that this precise issue merited review on certiorari, but was unable to resolve it when the Court split 4-4 and thus affirmed without opinion. *Board of Trustees v. McCreary*, 471 U.S. 83 (1985). In the years since, the Court has again noted that the issue remains unresolved, *see County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 n.50 (1989), and the Federal Courts of Appeals have explicitly disagreed and criticized one another as they have addressed the issue, *see infra* Part II (identifying and describing the conflicting cases). The issue is framed especially sharply in this case, where the public forum involved is closely associated with the seat of government.

This case involves an unattended private display of the quintessential symbol of the Christian faith -- the Latin cross -- directly in front of the Ohio Statehouse, at the very seat of Ohio state government. It thus squarely poses the issue left unresolved in *McCreary* and *County of Allegheny*, which continues to divide the lower federal courts. It also presents this Court with a substantial and important legal issue that confronts a fundamental tension between basic constitutional principles under the First Amendment, *namely*, whether the effect of the decision below is that "the public forum doctrine would swallow up the Establishment Clause." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

STATEMENT OF THE CASE

1. Respondents in this action, the Knights of the Ku Klux Klan (Ohio Realm) and two of their officers, brought this suit originally against the Capitol Square Review and Advisory Board, its executive director, spokesperson, and chairperson. The lawsuit sought in effect to compel the State of Ohio to allow Respondents to erect a large, unattended Latin cross directly in front of the Ohio Statehouse during the Christmas season, between December 8, 1993 and December 24, 1993. Respondents openly acknowledged that their purpose in seeking to erect the display at this location was to erect "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian government in America." Tr. of Dec. 20, 1993 Hearing at 101-02; *id.* at 53-55.

2. The Capitol Square is owned by the State of Ohio and located in downtown Columbus. It is the site of Ohio's state capitol building, also known as the Ohio Statehouse, which is a large rectangular building that centers the Capitol Square. The Ohio Statehouse, which is a distinctive example of Greek Doric architecture, is topped by a large rotunda. For well over a century, it has housed both chambers of the Ohio General Assembly as well as the offices of the Ohio Governor and other statewide officeholders. The Ohio Statehouse is the dominant feature of the Capitol Square, and it is plainly and unavoidably visible from every vantage point on the Capitol Square. *See* App. A43 (photograph). The District Court correctly held in this case that the Capitol Square is a public forum. *Id.* A18.

For the past several years, the State of Ohio has allowed certain holiday seasonal displays to be placed on the Capitol Square for limited periods during the month of December. The State's traditional policy is to allow a

broad range of speakers and other gatherings of people to conduct events on the Capitol Square. These displays are generally an exception to that policy because they are *unattended* structures. The holiday seasonal displays permitted by the State in the past have included a Christmas tree and a menorah. App. A14.

On November 18, 1993, the Capitol Square Review and Advisory Board, which is authorized by law to regulate the uses of the Capitol Square, voted not to permit unattended displays on the Capitol Square during December of 1993. That vote was later declared invalid, and on November 23, 1993, the Board voted to approve displays of a Christmas tree and a menorah. App. A14-A15. The State displayed its own Christmas tree, and a permit application to erect a menorah on the Capitol Square from December 8-16, 1993, which was explicitly stated to be a "seasonal display," was granted.

3. On November 29, 1993, Respondents applied for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event as being to "erect a cross for Christmas." Executive Director Keller denied the application on December 3, 1993, "upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." Respondents later clarified that they sought to erect a cross in the style of a Latin cross,[1]

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[1] "Latin cross" is the proper term for any "cross whose base stem is longer than the other three arms." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir.) (affirming preliminary injunction against display of lighted Latin cross on top of city fire department building during Christmas season because it would violate the Establishment Clause), *cert. denied*, 479 U.S. 961 (1986).

about ten feet high and six feet across and accompanied by an unspecified disclaimer. App. A15.

On December 9, 1993, Respondents filed an administrative appeal of this action to the full Board; the appeal was perfected on December 13, 1993. On December 17, 1993, a state administrative appeal was conducted by a hearing examiner who took evidence and heard argument from both sides. On December 21, 1993, the administrative hearing examiner issued a report and recommendation which found that the initial denial of a permit to Respondents was proper. The hearing examiner held, among other things, that whereas holiday seasonal symbols have by virtue of that association taken on "cultural significance extending well beyond the religious sphere," the Latin cross "is generally regarded as having a purely sectarian purpose (*i.e.*, to advance or endorse the Christian religion)." App. A34-A35. For that reason, the display of a Latin cross directly in front of the Ohio Statehouse, unlike the display of a Christmas tree or a menorah, was held to violate the Establishment Clause. *Id.* A36. The Board unanimously adopted this report and recommendation as its own final ruling later that day.

4. In the meantime, on December 15, 1993, Respondents filed this lawsuit in District Court, asserting that the denial of their application for permit to erect a cross violated their constitutional right of free speech. The court set the matter for hearing on December 20, 1993, and consolidated the hearing on Respondents' motion for a preliminary injunction with a trial on the merits. At the close of this hearing, the court deferred its ruling pending the outcome of the state administrative appeal process. Once that process was completed on December 21, 1993, the court granted a permanent injunction requiring Petitioners to approve a permit for Respondents to display a cross on the Capitol Square through December 24, 1993. App. A26.

In its ruling, the District Court considered whether Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse would constitute an impermissible "endorsement" of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as subsequently interpreted and applied in such "holiday seasonal display" cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny*. On the basis of a recent *en banc* decision by the Sixth Circuit Court of Appeals that addressed essentially the same issue, *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc), the District Court held that the unattended religious display in this case would not constitute an impermissible endorsement of religion so as to violate the Establishment Clause. App. A7-A8.

5. Immediately after the District Court issued its ruling, Petitioners moved for a stay pending appeal, which the court denied. Petitioners filed a Notice of Appeal to the Sixth Circuit on the same day -- December 21, 1993 -- and filed a motion for an emergency stay of the injunction pending appeal, which the Sixth Circuit denied on December 22, 1993. App. A40. Petitioners then filed an emergency application for a stay of injunction with Circuit Justice Stevens, which was denied on December 23, 1993. *Id.* A38. Justice Stevens determined that as Respondents' cross had been up for one day already, and would be up for at most one day more, it was likely that any irreparable harm which may flow from the display of the cross would likely have already occurred, and thus emergency relief was inappropriate at that juncture. *Id.* A39. He also noted that this matter would not become moot, as it is capable of repetition yet evading review, and stated that "[r]ather than asking my colleagues to resolve those issues summarily, applicants may be well advised to marshal their arguments in

a certiorari petition that can be considered with appropriate deliberation." *Id.* A39.

6. Respondents erected a cross on the Capitol Square sometime during the night of December 21, 1993, and it was displayed there the following day until it was apparently vandalized. The cross was displayed by itself in the middle of the lawn directly in front of the Ohio Statehouse, *see* App. A43 (photograph), located at some distance from the Christmas tree.[2] On December 22, 1993, Petitioners received yet another application from a group of Christian ministers, who sought to erect twenty more Latin crosses in front of the Ohio Statehouse. Petitioners believed themselves obligated, by the force of the District Court's ruling, to grant this further application, and thereafter numerous other crosses were erected and displayed in the same vicinity on December 23-24, 1993.[3]

7. On appeal, the Sixth Circuit affirmed the District Court's ruling. Initially, the court correctly noted that this 'case was not moot, under the "capable of repetition, yet evading review" standard enunciated in such decisions as *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See* App. A4. On the merits, the Sixth Circuit adhered to its recent *en banc* decision in *Americans United*, which "held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." *Id.* A8. The court focused in particular on the

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[2] The menorah had been removed almost a week earlier, when that permit expired on December 16, 1993.

[3] Appellants subsequently received an application for permit from a minister to erect a Greek Orthodox cross on the Capitol Square from January 2-8, 1994, which is when that church celebrates the holiday season. That application was granted also, based on the District Court's ruling.

nature of the display and the nature of the forum. It essentially held that because this display was privately sponsored, it did not matter what was contained in the display -- for example, a Latin cross in this case as opposed to a menorah in cases like *Americans United* and *County of Allegheny*. Because this display was to be located in a public forum, moreover, it did not matter what kind of location was to exhibit the display -- for example, the Ohio Statehouse in this case as opposed to a public park in cases like *Americans United* and *Lynch*. The Sixth Circuit thus determined that a reasonable observer could not conclude that the State of Ohio endorsed Christianity after viewing a large, unattended Latin cross standing directly in front of the Ohio Statehouse because "'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" *Id.* A9 (quoting *Americans United*, 980 F.2d at 1553) (emphasis in original). On this ground, the Sixth Circuit held that Respondents' display of a Latin cross directly in front of the Ohio Statehouse did not constitute an impermissible endorsement of religion under the Establishment Clause.

REASONS FOR GRANTING THE WRIT

Respondents seek to display the Latin cross, an inherently religious and indeed sectarian symbol, directly in front of the Ohio Statehouse. The Court should grant certiorari to determine whether such an unattended religious display in a location closely associated with the seat of government involves the State in a violation of the Establishment Clause. The Sixth Circuit's entrenched position -- that a privately sponsored religious display erected in a public forum can *never* violate the Establishment Clause, App. A8; *Americans United*, 980 F.2d at 1553 -- is inconsistent with the proper conjunction of this Court's decisions involving holiday seasonal displays, such as *Lynch*

and *County of Allegheny*, and this Court's "equal access" decisions, such as *Widmar v. Vincent*, 454 U.S. 263 (1981).

Moreover, the instant case offers the Court an excellent opportunity cleanly to address and resolve a longstanding issue about the proper relationship between the Establishment Clause and the public forum doctrine under the Free Speech Clause, in the particular context of unattended religious displays. The Court decided to consider and resolve this very same issue when it granted certiorari to review *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd mem.*, 471 U.S. 83 (1985). *See Board of Trustees v. McCreary*, 53 U.S.L.W. 3273 (U.S. 1984) (granting certiorari to consider whether "city is compelled under rule of *Widmar v. Vincent*, 454 U.S. 263 (1981), to allow placement of creche in park for approximately two weeks of Christmas season"). In the end, however, the Court was unable to resolve the issue authoritatively because it was equally divided and thus issued no decision on the merits. *See Board of Trustees v. McCreary*, 471 U.S. 83 (1985). The Court recognized and deferred the same issue again more recently, while noting that it had previously granted certiorari on the issue in *McCreary* without being able to resolve it. *See County of Allegheny*, 492 U.S. at 600 n.50. At an earlier stage of this case, moreover, Justice Stevens stated that Petitioners "may be well advised" to present the issue again before this Court in a certiorari petition. *See* App. A39 (Stevens, Circuit Justice).

Furthermore, the position adopted by the Sixth Circuit on this issue, while aligned with the Eleventh Circuit's decision in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc), directly and expressly conflicts with decisions rendered by the Fourth and Second Circuits. *See Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S.Ct. 74 (1990); *Kaplan v. City of*

Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992). This explicit split in the Federal Circuit Courts of Appeals reflects profound disagreement on the fundamental issue presented in this case and results in inconsistent rulings for parties who are located in different jurisdictions throughout the country.

Finally, the position set forth in the decision below frames a question of exceptional public importance in the context of unattended religious displays erected by private groups in a public forum closely associated with the seat of government: "In a public forum, the religious context of private speech is absolutely irrelevant for First Amendment purposes." App. A12. If allowed to stand, the decision below would lead to the public forum doctrine always taking precedence over the Establishment Clause, which would create serious difficulties for state and local governments that in good faith attempt not to "appear[] to take a position on questions of religious belief." *County of Allegheny*, 492 U.S. at 594.

I. THE SIXTH CIRCUIT IN THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The court below has adopted a blanket holding that any privately sponsored religious display located in a public forum, even a public forum that is closely associated with the seat of government, simply cannot, under any conceivable circumstances, be regarded as government endorsement of religion. That holding addresses an important question of Federal law which has not been, but should be, settled by this Court.

In *Lynch*, the Court ruled that a city's display of a creche as part of a larger Christmas holiday display located in a park was permissible under the Establishment Clause. The Court was narrowly divided on the outcome of the case, however, ruling by a 5-4 margin. The Court found that the facts of *Lynch* presented an extremely close question under the Establishment Clause, despite the fact that the display was located in a park rather than at the seat of government. Crucial to the Court's decision was the fact that the creche was displayed along with a large variety of secular symbols that had the effect of "negat[ing] any message of endorsement" of "the Christian beliefs represented by the creche." 465 U.S. at 695 (O'Connor, J., concurring).

Although the park in *Lynch* was owned by a nonprofit organization, it was located in the heart of the city's shopping district. The Court considered the creche similar to those found on public grounds, 465 U.S. at 671, and has long considered parks to be quintessential "public fora." In *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), for example, one of the first decisions to recognize the concept of the public forum, the Court expressly observed that parks in this country are universally considered to be public fora:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [Such] privilege . . . must not, in the guise of regulation, be abridged or denied.

See also Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2146 (1993) (parks and sidewalks are "traditional public fora"); *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J., concurring) ("types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks").

Shortly after *Lynch* was decided, the Court granted review in *McCreary* to consider and resolve the conflicting views expressed by the lower courts on the question of how the Establishment Clause would apply to the display of a solitary creche in a public forum. *See McCreary*, 53 U.S.L.W. 3273 (U.S. 1984) (granting certiorari to consider whether city "is compelled under rule of [*Widmar*] to allow placement of creche in park for approximately two weeks of Christmas season" and whether city would "violate Establishment Clause if it authorized placement of creche in park" under *Lynch*). The Court clearly understood that the distinct issue of unattended private religious displays erected in a public forum was not determined by its *Lynch* decision in the previous Term. The Court was unable to provide a definitive resolution of the issue, however, when it divided 4-4 and thus was obliged to affirm without issuing any clarifying opinion. *See McCreary*, 471 U.S. 83.

In *County of Allegheny*, the Court limited *Lynch*, again in a 5-4 ruling, by holding that the Establishment Clause does *not* permit the display of a creche as part of a holiday seasonal display that is located at the seat of county government, though not in a public forum. In *County of Allegheny*, significantly, the creche was not erected by the government, but was privately owned and sponsored. *See* 492 U.S. at 601 ("the fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. . . . [T]he Establishment

Clause prohibits what occurred here: the government's lending its support to the communication of a religious organization's religious message."). It was displayed, moreover, in a location that had occasionally been permitted to be used for other displays, such as a display of flags commemorating the anniversary of Israel's independence, though again that particular location was not itself a public forum. *See id.* at 600 n.50.

In *County of Allegheny*, the Court posed the Establishment Clause inquiry as "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." 492 U.S. at 592. At the very least, the Court held, the essential principle underlying the endorsement test "prohibits government from appearing to take a position on questions of religious belief." *Id.* at 593-94. The Court applied this analysis and distinguished *Lynch* by focusing on the effect of the religious symbol in its overall setting: "Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." *Id.* at 598.

For purposes of this case, however, the most important fact about *County of Allegheny* is that it again expressly recognized and deferred resolution of the open question that remained from *McCreary*. As the Court observed: "the creche here does not raise the kind of 'public forum' issue . . . presented by the creche in *McCreary v. Stone*, [which was affirmed] by an equally divided Court." *County of Allegheny*, 492 U.S. at 600 n.50.

The court below essentially ignored *Lynch* and summarily dismissed the relevance of *County of Allegheny*. App. A10. Instead, the lower court relied on its previous *Americans United* ruling, which rested its analysis on an

inference that the so-called "equal access" cases, such as *Widmar*, *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel*, have somehow *sub silentio* overruled or thrust aside many of the difficult and more fact-sensitive issues concerning unattended religious displays that this Court has grappled with in cases like *Lynch* and *County of Allegheny*. *See Americans United*, 980 F.2d at 1549 ("this case must be governed by [such cases as] *Widmar* and *Mergens*").

Any such inference, however, would be incorrect. In fact, the Court has appeared to treat the issues raised by unattended religious displays under the Establishment Clause and those raised by the "equal access" doctrine as essentially separate. The Court therefore has held that the latter doctrine applies to speakers who seek access for themselves to conduct meetings or similar events in facilities that have been opened for general use by the public, which is the precise understanding of this doctrine that Congress wrote into federal law in the Equal Access Act, 20 U.S.C. §§4071-4074, as upheld in *Mergens*.[4] At the same time, however, the Court in its "equal access" cases has treated its decisions concerning unattended holiday seasonal displays as distinct and inapposite without any detailed discussion. *See, e.g.*, *Mergens*, 496 U.S. at 249; *cf. County of Allegheny*, 492 U.S. at 600 n.50 (noting that the relationship between these two lines of doctrine has not yet been considered or resolved). The perceived gulf between these two doctrines apparently lies in the distinction between private speech and government speech. That distinction, though perhaps

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[4] The Act essentially makes it unlawful for any public secondary school which has a limited open forum to deny equal access or discriminate against "any students who wish to *conduct a meeting* within that limited open forum" on the basis of the religious or other content of their speech. 20 U.S.C. §4071(a) (emphasis added).

obvious enough in the context of particular visible speakers, lacks the same clarity when one considers an unattended display that does not itself articulate the nature of its connection to the government except by its contents and its location, especially when it is located at the very seat of government.

Finally, the court below downplayed the significance of two critical points in this case: the location of this religious display at the very seat of state government, and the nature of the religious symbol at issue in this case. On the location of the display, this Court in *County of Allegheny* explicitly distinguished its holding in *Lynch* on the grounds that the creche in *County of Allegheny* was located at the seat of county government in a prominent position. 492 U.S. at 599-600. The Court stated that no observer "could reasonably think that it occupies this location without the support and approval of the government." *Id.*; *see also id.* at 626 (O'Connor, J., concurring) (creche displayed at "the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community"); *id.* at 627 ("The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.").

Moreover, the unattended religious display here was of the Latin cross, a strictly religious, indeed sectarian, symbol. Unlike a creche, the Latin cross is not a traditional Christmas symbol, but instead is "the principal symbol of Christianity as practiced in this country today." *See, e.g., American Civil Liberties Union v. City of St. Charles*, 794

F.2d 265, 271-72 (7th Cir.) (Posner, J.) (enjoining holiday display of Latin cross on government building), *cert. denied,* 479 U.S. 961 (1986). In *County of Allegheny*, indeed, several members of this Court noted that the display of a Latin cross would raise distinct and troubling questions under the Establishment Clause. Justice Kennedy noted that the display of a large Latin cross on government property would certainly run afoul of the Establishment Clause, because it "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." 492 U.S. at 661 (Kennedy, J., concurring and dissenting). Justice O'Connor noted her agreement and added that such a display would run afoul of the Establishment Clause even if it were erected only for a short time. *Id.* at 629-30 (O'Connor, J., concurring).

In addition, both Justices cited with approval such cases as *Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (display of Latin cross in one quadrant of county seal violates Establishment Clause), *cert. denied*, 476 U.S. 1169 (1986). *See County of Allegheny,* 492 U.S. at 629 (O'Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring and dissenting). Justice Kennedy also cited with approval two other cases invalidating displays of the Latin cross in public parks. *See id.* In short, as the Seventh Circuit has summarized, "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993).

Contrary to the Sixth Circuit's analysis, then, this Court has clearly *not* settled, either expressly or implicitly, the issue of whether any conceivable private religious display in a public forum, regardless of its contents or its location, must be judged valid under the Establishment Clause. Instead, this case cleanly presents a straightforward

opportunity to consider and resolve that longstanding constitutional question.

II. THE SIXTH CIRCUIT'S DECISION CONFIRMS AND REINFORCES A DEEP AND PERSISTENT CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ON THE ISSUE OF WHETHER PRIVATE RELIGIOUS DISPLAYS IN A PUBLIC FORUM CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT CAN EVER VIOLATE THE ESTABLISHMENT CLAUSE.

The decision below follows directly upon the Sixth Circuit's previous *en banc* decision in *Americans United*. As the Sixth Circuit stated, broadly and clearly, in this case: "We have held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." App. A8 (citing *Americans United*, 980 F.2d at 1553). The court applied that general rule in this case despite the fact that the public forum here is closely associated with the seat of government. The Sixth Circuit's position, which was originally adopted in *Americans United* and emphatically followed in the decision below, is in direct conflict with the Fourth and Second Circuits, as the Sixth Circuit has explicitly acknowledged. Indeed, in *Americans United*, the Sixth Circuit has expressly "decline[d] the invitation to follow several cases cited by the plaintiffs." 980 F.2d at 1550-51 (discussing *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990), and *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)).

In *Smith*, the Fourth Circuit held that a creche erected by the Jaycees in a public forum -- there, the front lawn of

a county office building -- during the holiday season violated the Establishment Clause. The court quoted approvingly the way that the District Court distinguished the "equal access" doctrine from the analysis of unattended religious displays that is required under the Establishment Clause:

> In *Widmar*, the Supreme Court found that no *imprimatur* of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and its relation to the symbolic center of government, the appearance of a government *imprimatur* upon a certain religious ideology is present.

895 F.2d at 959 n.6 (quoting *Smith v. Lindstrom*, 699 F. Supp. 549, 565 (W.D. Va. 1988) (emphasis in original)). The court concluded that "the display unmistakably conveyed an 'endorsement' . . . therefore justifying some restriction on an otherwise available public forum." 895 F.2d at 959.

In *Americans United*, the Sixth Circuit initially tried to distinguish *Smith*, but then said more candidly that "even if *Smith* were exactly on point with this case, we believe that the *Smith* court simply erred by minimizing the importance of an equal access policy. We choose to avoid that error, rather than repeat it." 980 F.2d at 1551.

Similarly, in *Kaplan*, the Second Circuit found that a private group's unattended, solitary display of a large menorah in the public forum of City Hall Park, located directly in front of the seat of the Burlington city government, violated the Establishment Clause. The Court rejected the very argument adopted by the court below -- "that the [appellees] have an absolute constitutional right to

engage in symbolic expressive conduct in a public forum such as City Hall Park" -- because otherwise "the public forum doctrine would swallow up the Establishment Clause." 891 F.2d at 1029.[5] Again, the Second Circuit distinguished the "equal access" doctrine of *Widmar*, noting that "here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause." *Id.* at 1030.[6]

In a more recent decision, the Second Circuit has reaffirmed its adherence to *Kaplan*, again in a case involving a private organization's attempt to display an unattended menorah directly in front of the Burlington City Hall. *See Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109

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[5] Significantly, the Second Circuit in *Kaplan* recognized that the location of a public forum at the very seat of government sharpened the issue it had considered in *McCreary*, thus leading to its square disagreement with the position taken by the Sixth Circuit in this case:

> The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement. *See Widmar*, 454 U.S. at 273-75. Here, unlike in *McCreary*, the park involved is not any city park, but rather City Hall Park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. . . . In light of these facts, "[n]o viewer could reasonably think that [the display] occupies this location without the support and approval of the government." *Allegheny*, 109 S. Ct. at 3104.

Kaplan, 891 F.2d at 1029-30.

[6] The court also noted that based on appellees' argument, which it rejected, "it would also seem permissible to display, standing alone, a symbol of the majority faith -- a creche or a cross -- and this could well lead members of minority religions or nonbelievers to think that 'adherence to a religion' was relevant to 'standing in the political community.'" 891 F.2d at 1030 (quoting *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring)).

(2d Cir. 1991) (court rejected private organization's proposal to move the menorah further away from City Hall and place it near two signs that sent a secular holiday message), *cert. denied*, 112 S. Ct. 3026 (1992). The court again took the opportunity to explain that it found the "equal access" cases wholly inapposite, noting that the Supreme Court's intervening decision in *Mergens* "is factually distinguishable from this case for the same reason that its predecessor, [*Widmar*,] was distinguishable from *Kaplan*: it involved an open forum, with live speakers, in a public university." 936 F.2d at 112.

In *Americans United*, the Sixth Circuit also expressly disagreed with the Second Circuit, noting that "this court has criticized *Kaplan* heavily on several occasions," and identifying three such prior decisions in which the Sixth Circuit had sided instead with the dissenting judge in *Kaplan*. 980 F.2d at 1551. In the end, the Sixth Circuit curtly stated its disagreement with the Second Circuit on the issue of unattended religious displays erected by private groups in a public forum: "in light of the above discussion of *Widmar* and *Mergens*, it is clear that *Kaplan* simply misconstrues the endorsement test." *Id.*

In doing so, the Sixth Circuit aligned itself with the Seventh Circuit's decision in *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc), which upheld a display of religious paintings in a public park against a challenge framed under the Establishment Clause. *See Americans United*, 980 F.2d at 1551. In fact, however, the decision below represents a substantial extension of *Small*. In *Small*, the Seventh Circuit reversed the trial court's "finding that the religious content of a display in a quintessential public forum *far removed from the seat of government* violates the Establishment Clause, for public forums must be open to religious speech." *Small*, 964 F.2d at 619 (emphasis

added). Indeed, despite the earlier holding in *Small*, a panel of the Seventh Circuit has since enjoined a privately sponsored but publicly maintained crucifix that had stood in a public park for more than forty years as a violation of the Establishment Clause. *See Gonzales v. North Township,* 4 F.3d 1412 (7th Cir. 1993). The court held that the cross "does not bear secular trappings sufficient to neutralize its religious message," and indeed because it "does not convey any secular message, whether remote, indirect, or incidental," its "presence in the Park conveys the primary message of the Township's endorsement of Christianity." *Id.* at 1422-23.

Since *Americans United*, the Eleventh Circuit has adopted the same position as the Sixth Circuit, citing with approval both *Americans United* and the Seventh Circuit's decision in *Small*. The case, *Chabad-Lubavitch of Georgia v. Miller,* 5 F.3d 1383 (11th Cir. 1993), poses a direct conflict with *Kaplan* and *Smith*, as does the case at hand. In *Miller*, the court held that the state would not violate the Establishment Clause by allowing a private group "to display its privately owned menorah in the [Capitol] Rotunda, a public forum located in a core government building" under an equal-access policy. *Id.* at 1388. The Eleventh Circuit echoed the Sixth Circuit in directly criticizing the *Kaplan* and *Smith* decisions, brushing them aside as having "simply misunderstood the principles they sought to apply." *Id.* at 1394 n.17. Both *Miller* and the decision below thus confirm a direct conflict between the Sixth and Eleventh Circuits, on the one side, and the Second and Fourth Circuits, on the other side, on the issue of whether private religious displays located in a public forum closely associated with the seat of government can ever violate the Establishment Clause.

In addition, the Ninth Circuit has plainly recognized the same circuit split in *Kreisner v. City of San Diego*, 1

F.3d 775 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994). There the court noted all the same points made at more length above. First, the question of "whether placement of a private, overtly religious holiday display on public property represents government endorsement of religion" is one that the Supreme Court "has not yet squarely addressed." *Id.* at 782. "It has divided the circuits.... Even within individual circuits, the answer has not always been consistent. . . . Indeed, . . . virtually every panel to consider this issue has found itself divided." *Id.* at 783 (citing cases).[7]

Thus, it is clear that even after the Court's decision in *County of Allegheny*, and even after the Court's distinct ruling in *Mergens*, a sharp and persistent split concededly exists among the Federal Circuit Courts of Appeals on the sole issue presented in this case: whether an unattended religious display erected by a private group in a public forum closely associated with the seat of government can ever violate the Establishment Clause.

The Court therefore should grant certiorari in this case to resolve this central issue. Many Americans believe that "displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal." *County of Allegheny*, 492 U.S. at 651 (Stevens, J., concurring and dissenting). The extreme position adopted by the court

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[7] Although the Ninth Circuit thus acknowledged the issue presented in this case, its *Kreisner* decision cannot truly be regarded as adding to the specific circuit conflict identified here, as the court recognized, for the religious display at issue in *Kreisner* was located in a park that the court acknowledged was not "closely associated with the seat of government." 1 F.3d at 786 & n.7 (distinguishing *Kaplan* and *Smith* on this basis). The same point cannot be made about the case at hand.

below encourages increasing divisiveness and alienation in our society by undercutting the thrust of the Establishment Clause, which is designed to prevent public bodies from fomenting just such differences between members of society. *Id.* The decision below forces the state to violate the Establishment Clause by, in effect, "requir[ing] the Establishment Clause always to yield to the Free Speech Clause when the two are in conflict." *Americans United*, 980 F.2d at 1555 (Lively, J., dissenting). As this Court has recognized, however, Petitioners have a "compelling" state interest in avoiding any such violation of the Establishment Clause, which must override any free speech claims otherwise raised by Respondents. *See Widmar*, 454 U.S. at 271; *Lamb's Chapel*, 113 S.Ct. at 2148; *see also Lee v. Weisman*, 112 S. Ct. 2649, 2657-58 (1992) ("the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions").

It is most assuredly an intolerable state of affairs when such distinct and opposing positions represent the prevailing law of the land in different parts of this country. The effect of this situation is that persons who reside in different jurisdictions must shape their lives according to entirely incompatible applications of the First Amendment to the United States Constitution. The constitutionality of governmental efforts to appear neutral in religious matters and instill a feeling of equality in American citizens of minority faiths should be resolved by this Court, not solely for the benefit of the parties here, but for the benefit of the state, county, and local governments, and all of their citizens, who require guidance from this Court on the fundamental constitutional issue presented in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE FISHER
Ohio Attorney General

RICHARD A. CORDRAY
State Solicitor
Counsel of Record
CHRISTOPHER S. COOK
ANDREW S. BERGMAN
SIMON B. KARAS
ANDREW I. SUTTER
Assistant Attorneys General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-5026

Attorneys for Petitioners

October 24, 1994

No. 93-4367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. PINETTE; DONNIE A. CARR; KNIGHTS OF THE KU KLUX KLAN,	:	
Plaintiffs-Appellees,	:	**ON APPEAL from the United States District Court for the Southern District of Ohio**
CAPITOL SQUARE REVIEW AND ADVISORY BOARD; RONALD T. KELLER; DANIEL SHELLENBARGER; RICHARD H. FINAN,	:	
Defendants-Appellants.	:	

Decided and Filed July 25, 1994

Before: JONES and RYAN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

RYAN, Circuit Judge. Does a private organization's display of a religious symbol in a public forum violate the

Establishment Clause? We answered "No" in *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993)(*en banc*), provided that there is equal access to the public forum and the display itself is truly private. Yet some doubt lingers, at least in the mind of the defendants in this case, as to when private religious speech violates the Establishment Clause.

The Capitol Square Review and Advisory Board appeals the district court's injunction ordering the board to grant Vincent J. Pinette and the Knights of the Ku Klux Klan, Ohio Realm, a permit to erect a wooden cross in Capitol Square, a public square in front of the state capitol building in Columbus, Ohio. Because Capitol Square is a public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm.

I.

Capitol Square is a ten-acre public square located in downtown Columbus, Ohio, and is owned by the State of Ohio. Ohio's state capitol building, the Statehouse, is located in Capitol Square along with other governmental office buildings. For more than a century, countless public gatherings and cultural festivals have been held in the square. During the holiday season, the square has been decorated with lights, a Christmas tree, and, in recent years, a menorah. The Capitol Square Review and Advisory Board, by virtue of Ohio. Rev. Code Ann. §123.02.2, has the sole authority to regulate the various uses of the square.

On November 18, 1993, the board voted to ban unattended displays from the square during December 1993.

The board, however, reversed its decision within a week following public outcry. A Christmas tree went up, and on November 29, 1993, the board granted a permit to erect a menorah on the square during the eight days of Chanukah. On that same day, November 29, Donnie A. Carr, the Columbus unit coordinator for the Ku Klux Klan, Ohio Realm, applied for a permit to erect a cross on the square from December 8 through December 24, 1993. On December 3, Ronald Keller, the executive director of the board, denied the Klan's application for a permit, stating in a letter that his decision "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." On December 9, the Klan appealed Keller's decision; an administrative hearing was held and the hearing officer issued a report and recommendation advising that the Klan's application for a permit be denied. The board subsequently adopted that recommendation. On December 17, the Klan, through Vincent Pinette, its chief executive officer, Ohio Realm, sought an injunction in federal district court requiring the board to issue the permit. The district court held a hearing on December 20, and on December 21, the district court granted the Klan's request for an injunction and ordered the board to issue the permit. The district court concluded that Capitol Square was a traditional public forum and the cross the Klan proposed to erect was protected speech. The district court reasoned that because a private party (not the government) sought to display a religious symbol in a public forum, a reasonable observer would not perceive the display to be an endorsement of religion and thus the Establishment Clause was not implicated.

After the district court issued the injunction, the board immediately moved for a stay pending appeal, which the district court denied. On December 21, the board appealed

to this court and moved for an emergency stay pending the appeal, which we denied on December 22, 1993. The board then filed an emergency application for a stay of injunction with Supreme Court Associate Justice John Paul Stevens, our circuit justice, which he denied on December 23, 1993. 114 S.Ct. 626 (Stevens, Circuit Justice 1993). Meanwhile, the Klan erected the cross on Capitol Square on the evening of December 21; the cross remained there for at least a day until it was vandalized.

II.

Our jurisdiction, of course, depends upon the existence of an actual case or controversy. *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 406 (1972); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also* U.S. Const. art. III, §2. At the outset, we acknowledge that events subsequent to our hearing oral argument in this appeal have rendered this case moot: the injunction at issue has already expired and the cross no longer stands in Capitol Square. *Cf. Neighbors Organized to Insure a Sound Env't, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989). However, in a case in which an injury is inherently of such short duration as to make judicial review largely impossible, and the injury is likely to recur, we do not dismiss the case for mootness. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). We think it likely that the Klan or some other organization will, in the future, seek access to Capitol Square, and there is every reason to believe that any future action involving the same parties and issues will take at least as long to wind its way through the legal system as this case has. *See Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992). Thus, we are satisfied that we may properly exercise jurisdiction over this case under the exception to the mootness doctrine for wrongs capable of repetition yet evading review.

Ordinarily we review a district court's grant or denial of an injunction for an abuse of discretion, *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992), but here the district court combined the hearing on the injunction with a trial on the merits under Fed. R. Civ. P. 65(a)(2). Accordingly, we review the district court's findings of fact for clear error under Fed. R. Civ. P. 52 and its conclusions of law *de novo*.

The United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . . " U.S. Const. amend. I. The Religion Clauses of the First Amendment apply to the states via the Fourteenth Amendment. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Everson v. Board of Educ.*, 330 U.S. 1, 5 (1947). Private religious speech is protected under the Free Speech and Free Exercise Clauses. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Without a compelling interest, the government may not discriminate against private speech in a public forum on account of the speaker's views. *See, e.g., Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951). Speakers with a religious message are entitled no less access to public forums than that afforded speakers whose message is secular or otherwise nonreligious. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 274-75 (1981); *Niemotko*, 340 U.S. at 271-72; *Americans United*, 980 F.2d at 1553; *Doe v. Small*, 964 F.2d 611, 629 (7th Cir. 1992)(Easterbrook, J., concurring). Finally, we must keep in mind that "there is a crucial difference between *government* speech endorsing religion, which the

Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

Capitol Square is, indeed, a traditional public forum. Over the years, groups as divergent as the Ku Klux Klan and the United Way have held rallies and sponsored speeches in the square. During the holiday season, a menorah and a Christmas tree have been displayed on the square.

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey*[, 447 U.S. at 461].

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)(parallel citations omitted). As the Supreme Court observed in *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705 (1992), "regulation of speech on government property that has

traditionally been available for public expression is subject to the highest scrutiny." The Klan is entitled to the full protection of the public forum doctrine, even though it seeks to erect a cross rather than sponsor a speech. The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974)(*per curiam*).

The district court held that the Klan's plan to erect a cross in the square did not violate the Establishment Clause because a reasonable observer would not construe the display, sponsored by a private party and accompanied by a sign disclaiming governmental sponsorship, as an endorsement of religion. The defendants argue that the district court erred because (1) a cross is a powerfully religious symbol that cannot be "sanitized" through the ameliorating secular gloss associated with the Christmas holiday; and (2) the location of this distinctly religious display in front of the Ohio Statehouse and on Capitol Square would lead a reasonable observer to conclude that the State of Ohio endorsed Christianity. Until today, we had not thought that there would be any circumstances under which it could seriously be argued that the United States Constitution requires that religious speech be "sanitized."

For a government display of a religious symbol to pass constitutional muster, the display must: 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) "not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The *Lemon* test has subsequently been refined to ask whether a reasonable observer would view the disputed display as a government endorsement of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 687-94

(1984)(O'Connor, J., concurring); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). Of course, the display at issue here is not a government sponsored display; it is, in fact, privately funded and privately maintained, and carries an express disclaimer of any government support.

We have held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause. *Americans United*, 980 F.2d at 1553. In *Americans United*, we considered the constitutionality of a menorah displayed in a public square in Grand Rapids, Michigan. We acknowledged in that case that several aspects of the display arguably intimated government endorsement of religion: the display was undoubtedly religious; it stood in close proximity to official governmental buildings; and the display did not contain secular symbols. But we held that:

> [T]wo crucial facts make this case very different from many holiday display cases: [the] display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access. Although these facts are not automatically determinative, recent precedent indicates that they should carry much more weight than the details of the display emphasized by the plaintiffs.

Id. at 1545.

To silence a speaker in a public forum, the state must have a compelling interest, *Perry*, 460 U.S. at 45; defendants claim the compelling interest here is not violating the Establishment Clause. A reasonable observer, defendants argue, would conclude that Ohio endorsed Christianity after

viewing a cross standing in front of the Statehouse in Capitol Square. The defendants concede that the Klan's cross is private speech but they fear that some uninformed observer will come upon Capitol Square, and, on seeing the cross in front of the Statehouse, will draw the opposite conclusion--despite the fact that the cross carries a disclaimer of any government support.

The freedoms guaranteed by the Constitution cannot depend upon the fanciful perceptions of some hypothetical dolt. The obvious analogy is to the problem of the "Heckler's Veto" so eloquently discussed by Professor Kalven. Harry Kalven Jr., *The Negro and the First Amendment* 140-60 (1965). As we observed in *Americans United*:

> We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine.

980 F.2d at 1553. Similarly, Judge Easterbrook has written: "If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum." *Small*, 964 F.2d at 630 (Easterbrook, J., concurring). In short, the Establishment Clause forbids only religious speech sponsored by the government, so "truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer." *Americans United*, 980 F.2d at 1553.

Defendants argue that this is one of those rare cases, analogous to *County of Allegheny*, 492 U.S. 573, where private religious speech can violate the Establishment Clause. In *County of Allegheny*, however, the religious display--a privately sponsored holiday creche--was placed on a ceremonial staircase inside the Allegheny County Courthouse. In enjoining the display, the Court noted that the "Grand Staircase" was not the "kind of location in which all were free to place their displays for weeks at a time." *Id.* at 600 n.50. Clearly, the staircase was not a public forum. By allowing the display to be placed in a privileged location, the county endorsed it. In contrast, Capitol Square in Columbus is open to anyone, and there is no indication that Ohio treated the Klan or its display favorably.

Defendants also rely on three cases from the Seventh Circuit for the proposition that private religious speech can violate the Establishment Clause. In *ACLU v. St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), the Seventh Circuit enjoined the display of a lighted cross on a public building, a firehouse. The case is easily distinguished: the side of a public building, like a ceremonial staircase in a county courthouse, is not a public forum. By affording the religious speaker such an exclusive location from which to announce his message, the government "endorsed" or impermissibly supported a particular religious message. In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), the Seventh Circuit enjoined a permanent display of a crucifix in a public park. In that case, however, the crucifix was part of a war memorial that was donated to the township by the Knights of Columbus, *Id.* at 1421, so the display in effect became governmental religious speech. Finally, defendants point to language in *Small*, 964 F.2d at 619:

> Moreover, the mere presence of religious

> symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.

Defendants make much of the "far removed from the seat of government" language--indeed, too much. The undisputed holding of *Small* is that private religious speech in a public forum does not violate the Establishment Clause. *Id.* The fact that the park which was home to the disputed display in *Small* was "far removed from the seat of government" was little more than a gratuitous observation offered to bolster the court's conclusion that the park was, in fact, a true public forum unlike the ceremonial staircase in *County of Allegheny* and the side of the firehouse in *St. Charles*.

Religious groups may not be selectively denied access to public forums in the name of the Establishment Clause; the Free Speech and Free Exercise Clauses prohibit this. *Lamb's Chapel*, 113 S. Ct. at 2147-48; *Mergens*, 496 U.S. at 248-49; *Widmar*, 454 U.S. at 274-75. The potency of religious speech is not a constitutional infirmity; the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum. Zealots have First Amendment rights too. Some speech may be distasteful, unpopular, and outright offensive, but as Justice Thurgood Marshall so persuasively wrote, the protection found in the First Amendment does not depend upon popular opinion:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to

> express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on this basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley, 408 U.S. at 96 (footnote omitted). The constitutional command of governmental neutrality and even-handedness in regulating the public forum is no less binding in the case of private religious speech. In a public forum, the religious content of private speech is absolutely irrelevant for First Amendment purposes.

III.

Accordingly, we **AFFIRM**.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,

Plaintiffs,

vs. Case No. C2-93-1162

JUDGE GRAHAM

Capitol Square Review and
Advisory Board, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court upon a motion for a temporary restraining order and preliminary injunction filed by plaintiffs and upon a hearing held thereon on December 20, 1993. At the outset of the hearing, the Court announced that it would consolidate the hearing on the motion for preliminary injunction with a trial on the merits of Count One of the Amended Complaint pursuant to Fed. R. Civ. P. 65(a)(2).

FINDINGS OF FACT

1. Plaintiffs seek a permit to "Erect A Cross For Christmas" on the Capitol Square in Columbus, Ohio for the remainder of the time between December 8, 1993 and December 24, 1993.

2. Plaintiffs are the Knights of the Ku Klux Klan (Ohio Realm) (hereinafter "the Klan"), its chief executive officer, Vincent J. Pinette, and its Unit Coordinator for Columbus, Ohio, Donnie A. Carr. The Klan is an unincorporated association whose members reside in the State of Ohio.

3. Defendants are the Capitol Square Review and Advisory Board (hereinafter "the Board"), a state board chartered under Ohio Revised Code §123.022, its executive director, Ronald T. Keller, its spokesperson, Daniel Shellenbarger, and its chairperson, State Senator Richard H. Finan.

4. The Capitol Square, which is defined by law in §123.022(I) of the Ohio Revised Code, comprises an entire city block in downtown Columbus, Ohio, located south of Broad Street, north of State Street, east of High Street and west of Third Street. The Capitol Square is owned by the State of Ohio. It is the site of the Ohio state capitol building.

5. For many years, the Capitol Square grounds have been made available for speeches and public gatherings by various groups advocating various causes both secular and religious. For the past several years, displays have been placed upon the Capitol Square for limited periods during the month of December. These have included a Christmas tree and a free-standing Hanukkah menorah, which is a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah.

6. On November 18, 1993, the Capitol Square Review and Advisory Board, which regulates the use of the Capitol Square, voted not to permit displays on the Capitol Square during December, 1993. The vote was later declared

invalid and, on November 23, 1993, the Board voted to approve displays of a Christmas tree and a menorah.

7. On November 29, 1993, Rabbi Capland applied for permission to erect a menorah on the Capitol Square from December 8-16, 1993. The application described the type of event as a "seasonal display." The application was granted the same day by defendant Keller.

8. On November 29, 1993, plaintiff Carr applied on behalf of the Klan for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event as to "erect a cross for Christmas."

9. Executive Director Keller denied the permit four days later, on December 3, 1993. Keller stated in the letter denying the request that the decision to deny the permit "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution."

10. On December 9, 1993, the plaintiffs appealed this decision to the Board.

11. The same day, in a separate letter to counsel for the Board, plaintiffs' counsel indicated that the cross "would be approximately 10 feet high, 6 feet across, made from 2 x 6 lumber, painted white, secured upright by free-standing tripod, and accompanied by a sign, readable from a distance, "'this cross was erected by private individuals without government support for the purpose of expressing

respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property.'" Plaintiffs' counsel further stated in this letter that "some matters, such as the contents of the sign, are open to negotiation."

12. A state administrative appeal on this matter was conducted by a hearing officer on December 17, 1993, at 3:00 p.m. The hearing was concluded shortly after 5:00 p.m. on December 17th. The hearing officer issued his report and recommendation on December 21, 1993, finding that the Board's earlier denial of the permit was proper. The Board adopted his report and recommendation on December 21, 1993. On December 21, 1993 the Court was provided with a copy of the hearing officer's report and recommendation and entertained additional arguments of counsel on the effect of the Board's adoption of that report on the issues before this Court. The Court found, for the reasons stated on the record of the December 21, 1993 proceedings, that plaintiffs alleged failure to post a bond was not a proper ground for the denial of the permit and that that issue was not properly before this Court.

13. A Christmas tree has been displayed upon the Capitol Square from December 7, 1993 to the present and remains on display. A menorah was displayed upon the Capitol Square from December 8-16, 1993. On other occasions organizations have been permitted to erect free-standing displays on the Capitol Square for a limited period of time. Examples include the United Way Campaign "thermometer" and craftsmen's booths and displays erected during an Arts Festival. There is no policy against such displays.

14. Defendants do not contend that the erection of a cross poses a security risk of any kind.

CONCLUSIONS OF LAW

The defendants initially argued that the doctrines of finality and abstention precluded this Court from addressing plaintiffs' claims at this time. Those issues were resolved when the Board adopted the report and recommendation of the hearing officer. Thus, the sole issue now before this Court is whether plaintiffs are entitled under the First or Fourteenth Amendment to erect a Latin cross on the Capitol Square or whether this conduct would violate the Establishment Clause.

In order to prevail, plaintiffs must establish the following:

1) defendants' actions in refusing to issue the permit contravene plaintiffs' rights under the Constitution of the United States;

2) the plaintiffs will suffer irreparable injury absent injunctive relief;

3) the plaintiffs have no adequate remedy at law.

Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir. 1985), rev'd on other grounds, 477 U.S. 619 (1986); Buckhorn, Inc. v. Ropak Corp., 656 F.Supp. 209, 226 (S.D. Ohio 1987).

Assuming that the plaintiffs are entitled to erect such a display, they will suffer irreparable injury for which they have no adequate legal remedy if the defendants are not enjoined from denying them a permit. There is no other way for the plaintiffs to effectively vindicate their constitutional rights. Accordingly, plaintiffs' entitlement to the requested relief turns on the merits of their claim.

At the outset, the Court must determine whether the Capitol Square is a traditional public forum. The Supreme Court has defined three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). Traditional public fora are "those places which by long tradition or by government fiat have been devoted to assembly and debate." Id.

The evidence before this Court clearly establishes that the Capitol Square has been held open and used as a public forum for a considerable number of years. The Statehouse grounds have been made available for speeches or displays by gay, lesbian and bisexual groups, United Way of Franklin County, the Knights of the Ku Klux Klan, and commercial entities including participants in the Central Ohio Art Festival. During the December holiday season, the Capitol Square has also been used to display a menorah erected by a private organization. Thus, the Court finds that the Capitol Square is a traditional public forum.

The Capitol Square's status as a traditional public forum affords the plaintiffs significant constitutional protection. The First Amendment Free Speech Clause prohibits content-based regulation of the use of public fora. In Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983), the Supreme Court held that no government may exclude speech from a traditional public forum unless "it's regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." See also Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1541 (6th Cir. 1992) (en banc).

Religious expression enjoys the same First

Amendment protection as do other types of protected expression. Widmar v. Vincent, 454 U.S. 263 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Grand Rapids, 980 F.2d at 1542. Moreover, these protections extend beyond pure speech to any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). See also Grand Rapids, 980 F.2d at 1542. Thus, the Court must be particularly cautious about abridging an individual's right to freedom of speech based upon the religious content of the message. Grand Rapids, 980 F.2d at 1542.

Defendants, however, raise a countervailing constitutional concern. Defendants contend that the State of Ohio violates the Establishment Clause by permitting a private organization to erect a large, unattended Latin cross upon the Capitol Square during the observance of the Christmas holiday. Defendants contend that while the Capitol Square might be a public forum subject to the First Amendment protections outline above, its status as the seat of state government renders the display of a Latin cross an establishment of religion in violation of the First Amendment.

Based upon the Sixth Circuit's recent interpretation and application of County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) in Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992), this Court finds that plaintiffs' display does not constitute a government endorsement of religion, notwithstanding the fact that the Ohio state house is also located on the Capitol Square. In Grand Rapids, the Sixth Circuit considered whether a city's permitting a religious organization to place a private menorah displayed

in a traditional public forum during Hanukkah violated the Establishment Clause. Id. at 1542-43. The religious organization, Chabad House, had placed a 20-foot high menorah in Calder Plaza, the principle public plaza in downtown Grand Rapids. Id. at 1539-40. The plaza was surrounded by private office and government buildings including the Kent County Building, Grand Rapids City Hall, and the Federal Building. The county Hall of Justice, the city police station and the State of Michigan Office Building were also on opposing sides of the streets adjacent to the plaza. Id. at 1540. The menorah was accompanied by two signs measuring two feet by three feet which were illuminated at night. The signs read as follows:

> Happy Chanukah to All
>
> This Menorah display has been erected by Chabad House, a private organization. Its presence does not constitute an endorsement by the City of Grand Rapids of the organization or the display.

The menorah was paid for, erected, maintained and stored by the private organization. Id. at 1539.

Seeking to determine whether the City was violating the Establishment Clause by permitting the menorah display, the Sixth Circuit applied the three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

The appellate court found that the first and third prongs of the test were easily satisfied. Id. at 1543. A policy of permitting religious speech the same access as other types of speech serves a secular purpose. Id. This general access policy also avoids entangling government with religion, since no government official need decide which groups use the plaza. Id.

Turning to the second element of the Lemon test, the Sixth Circuit recognized that in County of Allegheny the Supreme Court had adopted a test first proposed by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668, 688 (1984):

> Since Lynch, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

Grand Rapids, 980 F.2d at 1543 (quoting County of Allegheny, 492 U.S. at 597 (Opinion of Blackmun, J.) (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985))). Accordingly, the Sixth Circuit framed the test as "whether the reasonable observer would conclude that Grand Rapids endorses religion by allowing Chabad House's display." Grand Rapids, 980 F.2d at 1544 (emphasis in original). Ultimately, the court concluded that the reasonable observer familiar with the many uses of the plaza would not interpret the menorah's presence as an endorsement of religion by the government. Id. at 1545. "[A] reasonable observer recognizes the distinction between speech the government supports and speech that it allows." Id.

(emphasis in original).

The plaintiffs in Grand Rapids identified several aspects of the menorah display which tended to suggest that the city was endorsing a religion: the display sent a religious message; it stood near the heart of local government; and it did not include secular symbols. Id. at 1544. Although the court agreed that these factors tended to support the claim that the display violated the Establishment Clause, the appellate court reasoned that "two crucial facts make this case very different from many holiday display cases: Chabad House's display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access." Id. at 1545. While these facts were not automatically determinative, the court stated that recent precedent indicated that "they should carry much more weight than the details of the display emphasized by the plaintiffs." Id.

The appellate court found it extremely significant that this speech was private in nature. The court noted that County of Allegheny involved a situation where the county gave a special preference to the group displaying the creche on the grand staircase, associated itself with the creche in county press releases and visually linked the county with the creche by placing next to official county signs two small evergreens identical to those in the creche display. Id. By doing so, the county effectively associated itself with that particular religious message. Id. No comparable connection between government and religion could be drawn from the menorah's presence on the plaza. According to the court, "the display at issue is purely private, with neither overt nor covert government support, and this fact weighs heavily against a finding of endorsement." Id. at 1546.

The appellate court found that the presence of

disclaimer signs further evidenced the private nature of this speech. "[T]he signs make the private ownership of the menorah obvious to anyone who cares to investigate the possibility of government endorsement." Id. These disclaimers were thus found to be another factor weighing in favor of allowing the display.

As important as private sponsorship was the fact that the city had traditionally provided all parties equal access to Calder Plaza. Id. The Sixth Circuit noted that the Supreme Court had repeatedly held that where an equal access policy exists, religious speech must be afforded the same privileges as nonreligious speech, the Establishment Clause notwithstanding. Id. at 1546-48.

The court also rejected plaintiffs' argument that the menorah display violated the Establishment Clause because it stood alone. Id. at 1549. The court explained that the symbol was in itself speech and did not have to be accompanied by adherents in order to be afforded the full panoply of protections. Id. Finally, the court observed that any tendency the menorah standing alone might have toward suggesting state endorsement of that religious view was "simply overwhelmed by Calder Plaza's status as a traditional public forum." Id. As the court explained:

> To a reasonable observer, no display actually stands alone in this public forum. In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the Plaza was opened. The reasonable observer knows that other speakers have used the Plaza before, and will do so again. Instead of concluding that religious zealots have stormed the gates with the city's endorsement, the reasonable

> observer recognizes this display as yet another example of free speech.

Id.

Applying the Sixth Circuit's reasoning in Grand Rapids to the facts and issues presented in the instant case leaves little doubt that the plaintiffs must be permitted to erect a cross on the Capitol Square. The instant request comes from a private party to erect a religious symbol in what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion. The Grand Rapids court plainly stated that the two most important factors in holiday display cases are the identity of the sponsor and the nature of the forum. Id. at 1553. ("Thus, we rule in favor of Grand Rapids and Chabad House, because we hold that truly private religious expression in a truly public forum cannot be seen as endorsement by a reasonable observer.")

Notwithstanding these considerations, the defendants -- relying on County of Allegheny and its progeny -- contend that this religious display at the seat of government will give rise to an Establishment Clause violation. Yet, County of Allegheny involved very obvious efforts by the government to associate itself with a particular religious display. By contrast, the State of Ohio is in no way associating itself with the plaintiffs' display. Indeed the "reasonable" observer -- being an individual who is knowledgeable about local events -- might well know by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the cross and any messages which might reasonably be associated with this display by the Klan. Moreover, the reasonable observer would likely know that a menorah was displayed during the

celebration of Hanukkah, and a Christmas tree has been displayed throughout the month of December. From all of this, the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism.

The fact that plaintiffs have chosen to display a Latin cross rather than some other religious symbol does not alter this Court's conclusions. The Grand Rapids decision does not expressly limit itself to those religious symbols which are most commonly or naturally associated with a particular holiday season. Indeed, a more recent Sixth Circuit decision indicates that the appellate court views crosses in much the same light as menorahs. See Congregation of Lubavitch v. City of Cincinnati, 997 F.2d 1160, 1164 (6th Cir. 1993):

> It is settled law in this circuit that a city does not violate the Establishment Clause by permitting a private organization, during the observance of Chanukah, to erect a large unattended menorah in a public square that is a traditional public forum. Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (en banc). Also, at this late date it cannot be argued that the display of such an object as a menorah or a cross is not "symbolic speech" that is protected by the free speech provisions of the First Amendment. Cf. Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2523, 2539, 105 L.Ed.2d 342 (1989).

Based on the foregoing, the Court concludes that the defendants have failed to demonstrate under the facts of this case that the reasonable observer would construe the erection of a Latin cross on the Capitol Square during the holiday

season as an endorsement of religion.

CONCLUSION

The plaintiff in this case bears a name which in the public conscience has come to represent racial hatred, a name which has been historically associated with violence against minorities. It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of peace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike. Plaintiffs are entitled to an injunction requiring the defendants to issue a permit to erect a cross on Capitol Square for the remainder of the time between today's date and December 24, 1993.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: December 21, 1993

BEFORE THE CAPITOL SQUARE REVIEW AND ADVISORY BOARD

In re:	:	
	:	
Application for Permit to Erect a Cross for Christmas by Knights of the Ku Klux Klan from December 8 to December 24, 1993	:	Hearing Examiner Keith S. Mesirow

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REPORT AND RECOMMENDATION OF HEARING EXAMINER

This matter came on for consideration pursuant to Ohio Revised Code Chapter 119 and Ohio Administrative Code Sections 128-4-04(A) and (B). Appellant, Knights of the Ku Klux Klan ("Appellant"), challenges the Capitol Square Review and Advisory Board's denial of Appellant's request to erect a cross on the grounds of the Ohio Statehouse from December 8 through 24, 1993.

Benson Wolman and David Goldberger, attorneys at law, representing the Knights of the Ku Klux Klan, and Richard A. Cordray and Christopher S. Cook, Assistant Attorneys General, representing the Capitol Square Review and Advisory Board, presented their respective positions at a hearing held on December 17, 1993. Also appearing at the hearing were Andrew Sutter and Drew Bergman,

Assistant Attorneys General.

The parties introduced and this Hearing Examiner accepted into evidence Stipulations of Fact pertinent to this matter. Also introduced into evidence were various other documents, including the affidavits of Ronald T. Keller, Executive Director of the Capitol Square Review and Advisory Board, Dr. Dennis Anderson, President of Trinity Lutheran Seminary, Vincent J. Pinette, Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm), Rabbi Harold J. Berman, and Cynthia Weikart, employee of the Attorney General of Ohio.

Based upon the evidence submitted, including the stipulations and affidavits hereinabove referenced, this Hearing Examiner makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Capitol Square comprises an entire city block in downtown Columbus, Ohio. The block is located south of Broad Street, north of State Street, east of High Street, and west of Third Street. (Stipulation 1).[8]

2. The State of Ohio owns Capitol Square and has erected the State's capitol building (the Statehouse) on that property. (Stipulations 2 and 3).

3. The Capitol Square Review and Advisory Board (the "Board") was created by statute in January 1993. (Stipulation 10).

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[8] The parties' Stipulations of Fact are referenced herein by paragraph as "Stipulation __."

4. The Board has statutory authority to operate the Capitol Square and to regulate all uses of the Capitol Square. (Stipulation 11).

5. In August 1993, the Board granted a permit requested by Vincent J. Pinette, Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm) authorizing Pinette and his associates to hold a rally on the Capitol Square grounds on October 23, 1993. (See Affidavit of Pinette, Paragraph No. 5).

6. On October 23, 1993, Vincent Pinette and his associates held a rally on the Capitol Square grounds on the north side of the Statehouse. (See Affidavit of Pinette, Paragraph No. 5).

7. Law enforcement officers from the State Highway Patrol, the Columbus Police Department, and the Franklin County Sheriff's Office were deployed on the scene of the October 23, 1993 rally. (See Affidavit of Pinette, Paragraph No. 8).

8. On October 26, 1993, the Board submitted a bill in the sum of $15,116.76 to the Appellant seeking reimbursement for security-related costs associated with the October 23, 1993 rally. (See Affidavit of Pinette, Paragraph No. 11).

9. The Appellant has not paid the bill submitted by the Board, and has, through counsel, represented that it will not pay this bill in the future.

10. In accordance with R.C. Chapter 119, the Board has promulgated regulations governing public use of the Capitol Square buildings and grounds, which regulations became effective on October 29, 1993. (Stipulation 12).

11. In recent years, certain displays have been placed upon the Capitol Square for limited periods of time during the month of December. (Stipulation 16).

12. For the past several years, the displays placed upon the Capitol Square for limited periods during the month of December have included a Christmas trees [sic] and a free-standing Hanukkah menorah. (Stipulation 17).

13. On November 23, 1993, the Board met and voted to approve the displays of a Christmas tree and a menorah upon the Capitol Square. (Stipulation 22).

14. On November 29, 1993, Rabbi Capland submitted an application for a permit to display a menorah upon the Capitol Square from December 8 through 16, 1993. (Stipulation 23).

15. On November 29, 1993, the Board approved Rabbi Capland's application. (Stipulation 23).

16. On November 29, Donnie Carr, representative of the Appellant, submitted an application to the Board seeking a permit on behalf of the Appellant for the display of a Latin cross on the Capitol Square (on the front of the Statehouse lawn) from December 8, 1993 through December 24, 1993. (Stipulation 24; Application of Carr).

17. Mr. Carr's application, which was completed in handwriting, bears a handwritten comment indicating that the Board's bonding requirement "does not apply." (Application of Carr).

18. By letter dated December 3, 1993, the Board's Executive Director, Mr. Ronald T. Keller notified Mr. Carr that the Board had denied the Appellant's application and

notified Mr. Carr of the Appellant's right to administrative appeal of the Board's determination. (Stipulation 25).

19. A Christmas tree has been displayed on the Capitol Square grounds from December 7, 1993 to the present time. (Stipulation 39).

20. A menorah was displayed on the Capitol Square grounds from December 8, 1993 until December 16, 1993. (Stipulation 39).

21. On December 9, 1993, the Appellant submitted a Notice of Appeal to the Board seeking administrative review of the decision to deny the permit requested by the Appellant. (Stipulation 27).

22. On December 10, 1993, the Board notified the Appellant that the Board would waive defects in the Appellant's notice of appeal, except that the Board would require the Appellant to submit a concise statement of the reason the appeal should be granted, as required by Board regulations. (Stipulation 29).

23. On December 13, 1993, the Appellant submitted a concise statement of the reasons the appeal should be granted. (Stipulation 32).

24. On December 17, the parties participated in an administrative hearing before this Hearing Examiner.

CONCLUSIONS OF LAW

1. Under Ohio Revised Code Section 123.022, the Capitol Square Review and Advisory Board bears responsibility for operating the Capitol Square and promulgating regulations governing use of the buildings and

grounds of Capitol Square. The Board has exercised its statutory authority and promulgated Ohio Administrative Code Chapter 128. Individuals or organizations wishing to use Ohio's capitol buildings or grounds are subject to the provisions of this Chapter.

2. Section 128-4-02 of the Ohio Administrative Code authorizes public use of the capitol buildings or grounds if the applicant adheres to a stated procedure for requesting such use, and if the proposed use:

(1) Does not interfere with the primary use of the capitol buildings or grounds;

(2) Is appropriate to the physical context of the capitol buildings or grounds;

(3) Does not unduly burden the managing authority;

(4) Is not a hazard to the safety of the public or state employees; and

(5) Does not expose the state to the likelihood of expenses and/or damages which cannot be recovered.

3. In addition, O.A.C. Section 128-4-03(O) interposes additional prerequisites to the approval of a request for use of the capitol buildings or grounds. That regulation states as follows:

> Liability - any individual or organization requesting to use the capitol buildings or grounds shall indemnify the state of Ohio, from and against all claims, demands, actions

> or causes of action, together with any and all losses, costs or related expenses asserted by any persons [sic] or persons for bodily injury or damage to property arising out of or in any way connected with the use of the capitol buildings or grounds.

4. The evidence adduced at the hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. The record does not establish whether other objections were raised by the Board's counsel.

5. In the present case, the Appellant, through its representative Donnie Carr, submitted to the Board an application to place a cross on the Capitol Square grounds from December 8 through 24, 1993. By asserting the inapplicability of the Board's bonding requirement, a facially neutral requirement designed to protect the state for damage done to the Capitol Square grounds during the period of public use of the grounds, and by refusing to reimburse the State for expenses incurred in a prior use of the Capitol Square grounds, the Board could properly deny the requested permit under O.A.C. Sections 128-4-02(5) and 128-4-03(O).

6. Notwithstanding the regulatory restrictions pertinent to this case, both parties rely on Constitutional arguments in support of their positions. The First Amendment of the U.S. Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion." The Board contends that the "establishment clause" prohibits the display of appellant's Latin cross display, yet does not prohibit the

display of a menorah on the Capitol Square grounds. Appellant argues that the Board's refusal to permit display of the Appellant's cross, after having permitted the display of a menorah, denies the Appellant equal protection of the law, as guaranteed by the Fourteenth Amendment to the U.S. Constitution, and also interferes with the Appellant's free exercise of religion.

7. In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), a plurality of Supreme Court Justices determined that the display of an Hanukkah menorah in front of a city/county office building did not violate the establishment clause, where the menorah was located next to a Christmas tree and other secular displays. By plurality decision, the Court also concluded that the display of a creche within a county courthouse did violate the establishment Clause, where the creche was displayed alone in a prominent position inside the courthouse.

8. Central to the Court's decision in *Allegheny* was the concept that "government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine." 492 U.S. at 601. The prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*." *Id.* at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (emphasis added in *Allegheny*).

9. As noted in Justice Blackmun's opinion in *Allegheny*, both Hanukkah and Christmas have become secular, as well as sectarian, holidays and that symbols associated with those holidays, including the menorah, likewise have cultural significance extending well beyond the religious sphere. 492 U.S. at 582-87.

10. It is well settled that the Latin cross is a primary symbol of the Christian faith. Unlike the menorah, the Latin cross is generally regarded as having a purely sectarian purpose (ie. to advance or endorse the Christian religion). *See, e.g., American Civil Liberties Union v. Mississippi State General Services Administration*, 652 F.Supp. 380, 383 (S.D.Miss. 1987). Several courts have determined that the establishment clause prohibits the display of a Latin cross on government property on the grounds that such display constitutes an impermissible endorsement of the Christian faith. *See, e.g., Harris v. Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3025, *cert. denied*, 112 S.Ct. 3054; *American Civil Liberties Union v. Rabun*, 678 F.2d 1379 (11th Cir. 1982), *mod., reh. denied*, 698 F.2d 1098 (lighted cross in state park violates clause); *American Civil Liberties Union v. City of St. Charles*, 622 F.Supp. 1542 (N.D.Ill. 1985), *aff'd*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986)(granting preliminary injunction prohibiting city's display of lighted Latin cross on city fire department building).

11. On November 23, 1993, the Board concluded that it would permit the display of a Christmas tree and a menorah on the Capitol Square grounds. The Board's decision in this regard is supported by *Allegheny* and is not at issue in this appeal. Nor is there any evidence in the record indicating that the applicant for the permit seeking the display of the menorah failed to comply with any requirements of O.A.C. Chapter 128.

12. The evidence in the record before this Hearing Examiner establishes that Appellant refused to comply with Chapter 128 of the Administrative Code by rejecting responsibility for expenses incurred by the State in connection with the Appellant's proposed display. If the Board were to approve the Appellant's permit application,

notwithstanding the Appellant's insistence that it is not subject to the Board's bonding requirements, the Board would essentially place the Appellant and the Appellant's religious symbol above the law. Such treatment would constitute an impermissible endorsement of one religious symbol over others. The Appellant has made no argument that this neutral bonding requirement has been discriminatorily applied or is otherwise unconstitutional, either facially or as applied.

13. Quite apart from the impact of Chapter 128 of the Administrative Code, relevant federal case law indicates that displays of menorahs and other symbols having both secular and sectarian significance during the holiday season do not run afoul of the Constitution, while displays of the Latin cross, which has a uniquely sectarian purpose does violate the establishment clause. *See Allegheny, supra; Mississippi State, supra.*

14. The conclusions reached herein are not elevation of form over substance and should not be so construed. The First Amendment requires a delicate balance of the rights of all concerned parties. To permit Appellant to choose which of the statutory and/or administrative mandates it will follow, while demanding that all other permit applicants rigidly adhere to those mandates, would subject the Board to claims of preference of one religious symbol over another. Clearly, such a result is untenable.

15. The Board is without authority to defy the strictures of the Constitution or to ignore the regulations set forth in O.A.C. Chapter 128. Had the Board granted the Appellant's application for a permit under the circumstances presented herein, the Board's action would have been violative of its strict mandate to comply with all Constitutional proscriptions and all governing statutes and rules.

Based upon all of the foregoing, it is this Hearing Examiner's opinion that the Board's denial of the Appellant's request was proper and should stand.

_____ _____

Date Keith S. Mesirow, Hearing Examiner

A38

CAPITAL SQUARE REVIEW AND ADVISORY BOARD et al.

v.

Vincent J. PINETTE et al.

No. A-517.

Dec. 23, 1993.

Justice STEVENS, Circuit Justice.

Today is Thursday, December 23, 1993. Yesterday evening petitioners filed with me, in my capacity as Circuit Justice for the Sixth Circuit, an application for a stay of an injunction entered by the District Court and upheld by the Court of Appeals. The injunction required petitioners to allow the respondents, the Knights of the Ku Klux Klan and its leading officers, to erect a large Latin cross in front of the Ohio Statehouse in Columbus, Ohio. As I understand the situation, the cross is in place now and is scheduled to be removed tomorrow. If I were to grant the application forthwith, it would be removed today--unless, of course, respondents could persuade the full Court to reinstate the injunction.

The case is unique because the District Court found that the local government has effectively disassociated itself from the display:

> "Indeed, the 'reasonable' observer--being an individual who is knowledgeable about local events--might well know by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the

> cross and any messages which might reasonably be associated with this display by the Klan. Moreover, the reasonable observer would likely know that a menorah was displayed during the celebration of Hanukkah, and a Christmas tree has been displayed throughout the month of December. From all of this, the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." No. C2-93-1162 (SD Ohio, Dec. 21, 1993), p. 13.

In their application, petitioners do not dispute the accuracy of that finding.

Whether or not petitioners' legal position is sound (and my opinion in *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 646-655, 109 S.Ct. 3086, 3129-3133, 106 L.Ed.2d 472 (1989) explains why I am not unresponsive to their arguments), they must shoulder the burden of persuading me that irreparable harm will ensue if I do not grant their application. Frankly, it is my opinion that whatever harm may flow from allowing the privately owned cross to remain in place until tomorrow has probably already occurred. Moreover, because the legal issues are presumably capable of repetition, I do not believe the case will become moot when the cross is removed tomorrow. Rather than asking my colleagues to resolve those issues summarily, applicants may be well advised to marshal their arguments in a certiorari petition that can be considered with appropriate deliberation.

For these reasons, I shall defer to the judgment of the Court of Appeals and deny the application.

It is so ordered.

No. 93-4367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. PINETTE; DONNIE A. CARR; KNIGHTS OF THE KU KLUX KLAN, Ohio Realm,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
CAPITAL SQUARE REVIEW AND ADVISORY BOARD; RONALD T. KELLER; DANIEL SHELLENBARGER; RICHARD H. FINAN, Senator,	)	
Defendants-Appellants.	)	

BEFORE: KENNEDY and NELSON, Circuit Judges; and ENGEL, Senior Circuit Judge.

Defendants appeal an injunction requiring them to issue to plaintiffs a permit to erect a cross on Capital Square in Columbus, Ohio. They now seek an emergency stay of the injunction pending appeal. Plaintiffs oppose the motion for a stay.

The factors to be considered in ruling on the motion for a stay are: 1) whether defendants have made a strong

showing that they are likely to succeed on the merits; 2) whether defendants will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir. 1991); American United for Separation of Church and State v. Grand Rapids, 922 F.2d 303, 306 (6th Cir. 1990). In ruling on the motion for a stay, we are not reviewing the district court's grant of the injunction, but we are "bound to accept the district court's factual findings unless we find them to be 'clearly erroneous.'" Congregation Lubavitch v. City of Cincinnati, 923 F.2d at 460.

The district court found that Capital Square is a traditional public forum. The First Amendment requires that any restrictions on the use of such a forum be content neutral, narrowly tailored to serve a significant governmental interest, and leave ample alternatives for communication. United States v. Grace, 461 U.S. 171, 177 (1983). Discrimination against religious speech on the basis of its content can violate the First Amendment. See Widmar v. Vincent, 454 U.S. 363 (1981); Americans United for the Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1542 (6th Cir. 1992) (en banc).

Defendants argue that the State of Ohio violates the Establishment Clause by permitting plaintiffs to erect a large, unattended cross on Capital Square during the Christmas holiday. The cross, however, is privately sponsored and is to be erected in a public forum. Thus, defendants have not made a strong showing that they are likely to succeed on the merits of their appeal. See Congregation Lubavitch v. City of Cincinnati, 997 F.2d 1160, 1164 (6th Cir. 1993);

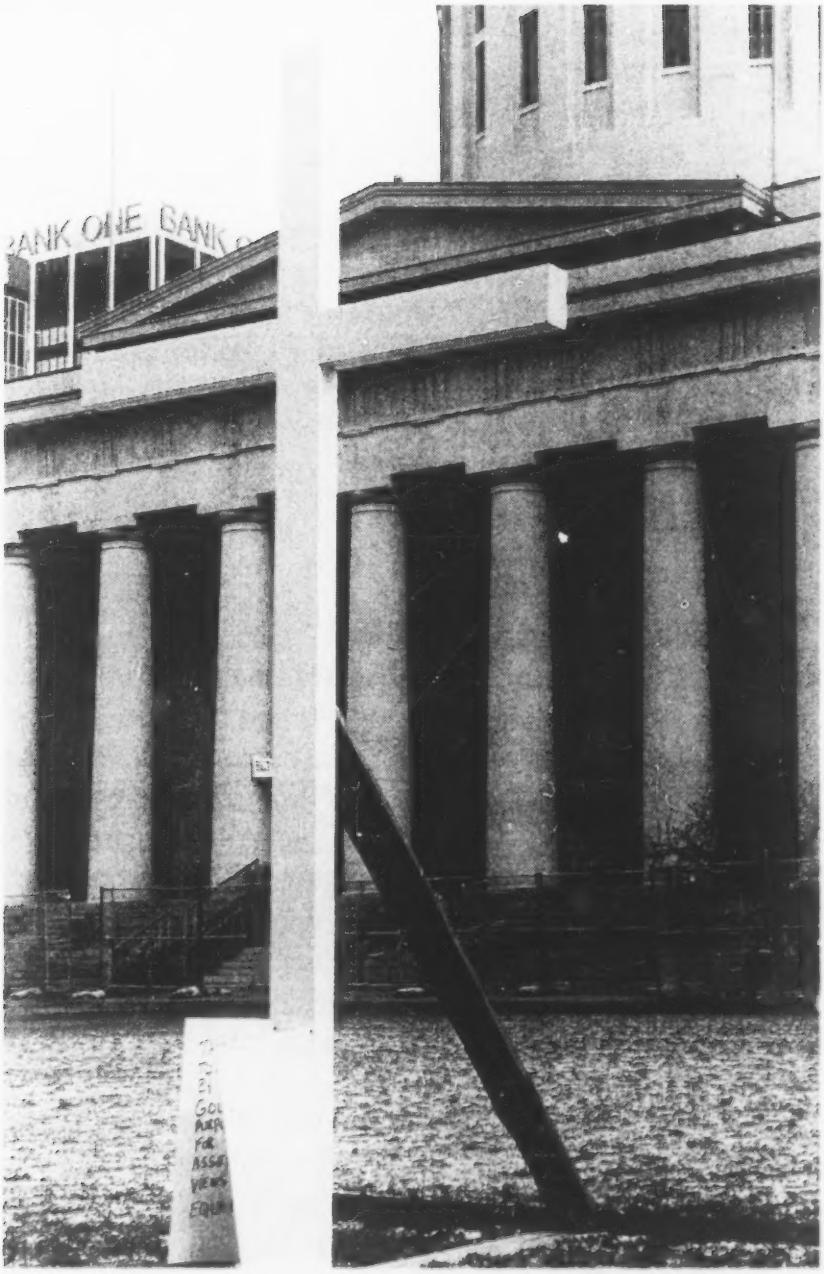
Americans United for the Separation of Church and State v. City of Grand Rapids, 980 F.2d at 1543-48.

It therefore is ORDERED that the motion for a stay pending appeal is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk



*This photograph was included in the parties' stipulated Submission of Supplemental Exhibits filed on March 22, 1994.